EDITOR'S NOTE

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86-658

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

RAYMOND G. BADER, JIMMY N. HALE, PHILLIP M. SANDERS, and JOSEPH C. WAGNER,

Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPPEALS
FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

WHETHER ALLOWING THE GOVERNMENT TO USE "SECRET SETTLEMENTS" TO MITIGATE THE PENALTY OF REMOVAL IMPOSED AGAINST SOME, BUT NOT ALL, EMPLOYEES FIRED FOR STRIKING AGAINST THE FEDERAL GOVERNMENT ABROGATES THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE UNITED STATES CONSTITUTION.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reprinted in the Appendix to this petition and is an unpublished decision of the Court. The opinions of the United States Merit Systems Protection Board are reprinted in the Appendix to this Petition. The Bergh v. Department of Transportation, FAA, decision on which the Court below based its decision in this case is also reprinted in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 18, 1986 and the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS

5 U.S.C. Section 2301(b):

> Federal personnel management should be implemented consistent with the following merit system principles...
>
> (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
>
> (8) Employees should be
>
> (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes...

5 U.S.C. Section 7703(c):

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...

5 U.S.C. Section 7311:

> An individual may not accept or hold a position in the Government of the United States...if he ... (3) participates in a strike ... against the Government of the United States...

STATEMENT OF THE CASE

Petitioners, air traffic controllers employed by the U. S. Department of Transportation, Federal Aviation Administration, [hereinafter FAA], were fired for striking against the government in August 1981. Before the Merit Systems Protection Board and Court of Appeals for the Federal Circuit, Petitioners, among other arguments, alleged the removal for striking was in violation of the equal treatment guarantees found in the Merit System Principles of the Civil Service Reform Act and the Fifth Amendment Equal Protection Clause of the U.S. Constitution. The claimed

denial of equal treatment was based upon the Government's entering "secret settlements" which mitigated the penalty of removal imposed against some, but not all, of the employees who were fired for striking in August 1981. The Court of Appeals and Merit Systems Protection Board rejected Petitioner's contentions and denied Petitioner's request to reopen the record for additional discovery and admission of evidence regarding the settlements with similarly situated employees.

The only issue presented in this case which had not previously been decided by the Court of Appeals in other air traffic controller appeals was: Whether the record should be reopened for discovery and introduction of evidence which might prove the government violated

petitioner's constitutional and statutory rights to equal treatment for similar offenses when it entered into secret settlements with a number of controllers fired for striking and reduced their removal to a suspension without pay for being Absent Without Leave (AWOL). The Court of Appeals denied the appeal based upon its July 2, 1986 ruling in Bergh v. Department of Transportation, FAA, 794 F.2d 1575. (Appendix F). In Bergh the Court basically ruled that the requirements of the Civil Service Reform Act of 1978 guaranteeing equal treatment of employees do not apply to settlement agreements which reduce penalties previously imposed. The Court concluded that the law favors settlement of cases and overlooked the prior law requiring the government to prove by a preponderance of the

evidence that there were legitimate reasons for disparate treatment once an employee-appellant alleges disparate treatment in comparison with other employees.

The facts which first gave rise to Petitioner's claim of disparate treatment was counsel's discovery in November 1982 that a number of controllers who were fired and had appealed their firings to the MSPB had their appeals dismissed without explanation. Subsequently, a Freedom of Information Act lawsuit filed against the FAA in the United States District Court for the Western District of Tennessee, Civil Action No. 83-2315-HA, W.D. Tenn. (1983),(reported at 580 F.Supp. 984 (1983), resulted in a court order denying the government's claim of exemption of the settlements from the

FOIA. Subsequent production of 123 redacted files by the government verified that federal employees fired for striking had their removal reduced to a suspension without pay for being Absent Without Leave after they appealed their removal to the MSPB. Reasons for the lesser penalties being imposed against these strikers have not been disclosed by the government. The request to reopen the record and allow further discovery and introduction of evidence relating to these settlements was denied upon a ruling that the evidence was not relevant. The Court below reviewed the MSPB decision pursuant to 5 U.S.C. Section 7703. The MSPB review of Petitioner's appeal of the termination decision was pursuant to 5 U.S.C. Section 7513(d) and Section 7701.

REASONS FOR GRANTING WRIT

The Court of Appeals for the Federal Circuit decided a question of law which affects the rights of every federal government employee under the Civil Service Reform Act of 1978 and which has not, but should be, settled by this Court. The Court denied requests to reopen the record below for discovery concerning alleged "secret settlements" entered between the FAA and certain other air traffic who had, like Petitioners, been fired for striking in August, 1981. The Court denied the request based upon its opinion in Bergh v. Department of Transportation, FAA, wherein the Court ruled in effect that disparate treatment in discipline which results from settlement of cases before the Merit Systems Protection Board does

not violate the prohibitions against disparate treatment in discipline found in the Civil Service Reform Act and the United States Constitution.

I. FAILURE TO GRANT THE WRIT WILL RENDER THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE U. S. CONSTITUTION MEANINGLESS.

The decision of the U.S. Court of Appeals for the Federal Circuit in this case, relying on its decision two weeks earlier in Bergh v. Department of Transportation, FAA, 794 F.2d 1575 (July 2, 1986), has the effect of reversing the prior rule of law which required government agencies to prove by a preponderance of the evidence that there were legitimate reasons for disparate treatment of employees for similar alleged misconduct. Woody v.

General Services Administration, 6 MSPR 468, 488 (1981); Douglas v. Veterans Administration, 5 MSPR 280, 306-7 (1981); Bivens v. TVA, 8 MSPR 458, 463 (1981); Washington v. TVA, 8 MSPR 27, 29 (1981); Filip v. Veterans Administration, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

The Court in Bergh concluded that

> Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

Appendix F. In addition, the Court concluded that the explanation of counsel for the agency in its brief to the Court of why it reduced the removal penalty for some controllers met the Government's burden and that settlements were to be encouraged. If these rulings of the Court of Appeals are allowed to stand, then the government in the future will be allowed to routinely make "end runs" around the equal treatment guarantees of the Civil Service Reform Act of 1978 and the equal protection guarantees of the U.S. Constitution. Obviously, to avoid the Woody and Douglas burden of proof when disparate treatment is alleged by an employee who has been disciplined, all the government will have to do is provide equal penalties initially and then enter secret settlement the next day

with the favored employee reducing or eliminating the penalty imposed.

The intent of the Congress and the President of the United States in the enactment of the landmark Civil Service Reform Act of 1978 was mainifestly clear: to remedy serious defects in the Nation's Civil Service System, especially continuing abuses of the "merit system" first set up by the Pendleton Act of 1883. As the Court of Appeals for the Federal Circuit stated in Schapansky v. Dept. of Transp., FAA, 735 F.2d 477, 485 (1984), "Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated". To ensure that this ideal justice is attained the Civil Service Reform Act was amended in 1978 to correct some of its earlier weaknesses.

Remedial legislation regulating the conditions of employment (like the Civil Service Reform Act and the Fair Labor Standards Act) is to be liberally construed "in favor of the workers whom it was designed to protect" with an eye toward carrying out the intent of Congress and the will of the people in passing enactments to remedy past abuses. Wirtz v. Ti Ti Humus Company, 373 F.2d 209 (4th Cir. 1976), citing Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

The recent MSPB BREAKING TRUST report concluded that the merit system principles and prohibited personnel practices, "Taken together ... constitute a sort of 'Magna Charta' or constitution of federal employment law. BREAKING TRUST, Prohibited Personnel Practices in the

Federal Service, Director's Monograph, U. S. Merit Systems Protection Board Office of Merit Systems Review and Studies, February 1982 at 1, hereafter cited as BREAKING TRUST. That "Magna Charta or constitution" has been violated through the secret settlements and now sanctioned by the Court's decision below.

While the U. S. Government gave the impression to the world that all striking air controllers who failed to return to work by their deadlines were permanently fired, that same Government gave favorable treatment and special consideration to at least 123 air traffic controllers by reintstating them after they went on strike, were fired for doing so, and had appealed their firings to the MSPB. Norwood v. FAA, 580 F. Supp. 984 (W.D. TN. 1983). For the 123 the

penalty of removal for striking was reduced to a suspension without pay for being Absent Without Leave and implemented through secret settlement agreements. Id.

The "secret settlements" were learned of by Petitioner's counsel for the first time in November 1982 when he became aware of the dismissal, without explanation, of several cases pending before the MSPB. Each of these cases involved air traffic controllers fired for striking in August 1981. They were fired only after having had an opportunity to respond to the charges of striking and having had those defenses rejected by the FAA. That the secret settlements were entered was later verified through a Freedom of Information Act lawsuit filed by counsel for Petitioner in the United States

District Court for the Western District of Tennessee. Norwood v. Federal Aviation Administration, 580 F. Supp. 994 (W.D.TN. 1983). The Honorable United States District Court Judge Odell Horton granted a motion for partial summary judgment for the Plaintiff in that case, rejecting all of the Government's claims that these settlements were exempt from disclosure under the Freedom of Information Act and ordering that the Government release the inculpatory documents based on there being a "strong public interest in ascertaining whether the agency authorized to deal with the Nation's aviation safety handled matters surrounding the strike in a fair and consistent manner." (emphasis added) Id.

Petitioner suggested below that

secret settlements in fedeal personnel management violate two of the merit principles, to wit:

> Federal personnel management should be implemented consistent with the following merit system principles:...
>
> (2) All employees and applicants for employment should receive **fair and equitable treatment in all aspects of personnel management** without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and **with proper regard for their privacy and constitutional rights**
>
> (8) Employees should be
>
> (A) **protected against arbitrary action, personal favoritism,** or coercion for partisam political purposes.

5 U.S.C. 2301. (Emphasis added) Under 5 U.S.C. § 7701(c)(2)(B), any agency personnel decision, even assuming arguendo it is supported by a preponderance of the evidence, must be reversed where the employee shows that

the decision was based on any prohibited personnel practice. Clearly, agencies act illegally, arbitrarily and capriciously when they dispense unequal penalties for equal offenses. In one case, a United States Tennessee Vally Authority employee was fired for possession of a firearm on TVA property -- while other TVA employees found with firearms were merely given warning letters. The Merit Systems Protection Board held in that case that where rules are inconsistently applied, agency decisions to remove employees will be overturned. Washington V. Tennessee Valley Authority, 8 MSPR 27, 29 (1981).

In another MSPB-TVA case involving illegal, arbitrary and capricious discrimination in the form of unlike penalties for like offenses, two employees were fired for removing

TVA equipment, for unauthorized use of TVA equipment, and for other offenses. Before the MSPB, the fired TVA employees produced unrebutted evidence that other similarly situated employees were given less severe penalties. The Merit Systems Protection Board ordered the less severe 60 day suspension be imposed instead of the unequal and discriminatory firing. Bivens and Marshall v. Tennessee Valley Authority, 8 MSPR 458 (1986). The Board continued to follow this rule in Filip v. VA, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

Because the MSPB denied the request for discovery of and thereafter introduction of evidence of unequal treatment inherent in the 123 being

rehired through secret settlements, Petitioner was not afforded the same procedural rights and remedies as fellow U. S. Government employees (e.g. Washington, Bivens and Marshall). As a result Petitioner was denied a hearing on the unequal treatment by which they have been denied their rights under the Civil Service Reform Act and the Equal Protection provisions in the United States Constitution.

The federal courts are not strangers to similar cases of outrageous and invidious discrimination. For example, in the landmark Constitutional law case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886), San Francisco required by ordinance that all hand laundries be in brick or stone buildngs (rather than in cheaper frame

buildings) unless there was special permission granted by the Board of Supervisors. Chinese immigrants were denied permission for a variance, were convicted of violation of the city ordinance, and were sentenced to imprisonment. The United States Supreme Court held the Equal Protection guarantees of the Constitution were violated by such discrimination.

In the case at hand, the Government avoided compliance with the Yick Wo rule by concealing the evidence that will prove denial of equal treatment under the law and the Court of Appeals for the Federal Circuit decision sanctions that concealment. The secrecy in the settlements implies that the reason some strikers were reinstated was because some have more influence than

others at FAA.

Under the Civil Service Reform Act, at 5 U.S.C. 7701(c)(2), no Merit Systems Protection Board decision may be upheld where the employee or applicant

> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
>
> (C) shows that the decision was not in accordance with law.

Petitioner contended below that (A) they have been victims of harmful error in exclusion of materially relevant evidence of unequal treatment, that (B) the personnel decisions affecting them were tainted with prohibited personnel practices [violations of 5 U.S.C. §§ 2301(b)(2)

and (b)(8)(a) inherent in the secret settlement] and that (C) the decision was not in accordance with the law and administrative decisions of the MSPB relating to unequal penalties for equal offenses.

The language of the statute requires only one of these three elements be present for a decision to be overturned. In this case, all three elements were present, providing the Court below with strong and compelling grounds for reopening the record in the interest of justice. If the Civil Service Reform Act is to be "treated as a working instrument of government and not merely as a collection of English words," United States v. Dotterwich, 320 U.S. 277, 280, 64 S.Ct. 134, 136 (1943), unequal treatment of Government employees who commit similar offenses must be

remedied. Only in a new hearing will Petitioner's rights be protected through the introduction into evidence of the 123 secret settlements and other evidence of unequal treatment. Allowing the ruling of the Merit Systems Protection Board and Court of Appeals to stand would encourage government law breaking through the new tool of "secret settlements" the day after "equal" penalties have been imposed.

Petitioners have been wronged, because information about possible illegality, irregularity and fraud in the settlement of the claims of a minority of air traffic controllers has been kept out of the consideration of Petitioner's case. Petitioners sought to have their cases remanded with an order to allow them an opportunity to enage in further

discovery about the secret settlements. The Civil Service Reform Act very specifically gives federal courts this power to right wrongs:

> The court shall review the record for the purpose of determining whether the findings are in accordance with law, and whether the procedures required by statute and regulations were followed ... the findings of the Board are conclusive if supported by evidence in the record. **If the court determines that further evidence is necessary, it shall remand the case to the Board.** The Board, after such further proceedings as may be required, may modify its findings, and shall file with the court the record of such proceedings. The findings of the board are conclusive if supported by the evidence in the record as supplemented.

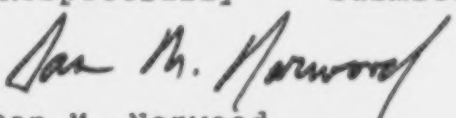
5 U.S.C. 7702. [Emphasis added] A remand on this crucial Civil Service Reform Act and constitutional law issue is indeed a very small price to

pay for assuring the honesty and integrity of the federal personnal system.

CONCLUSION

If we are to reach the "ideal justice" this Court referred to in Schapansky, Id. at 485, "secret settlements" of federal employee appeals of disciplinary actions must be prohibited and the decision below should be reviewed and reversed. For these reasons, Petitioners request the Court grant the writ of certiorari.

Respectfully submitted,



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October 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was sent by regular mail, postage prepaid, this 16th day of October, 1986.

Solicitor General
Department of Justice
Washington, D.C. 20530

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Dan M. Norwood

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYMOND G. BADER, JIMMY N. HALE, PHILLIP M. SANDERS, and JOSEPH C. WAGNER, JR.,	*	
Petitioners,	*	
V.	*	Appeal NO. 85-1115
	*	MSPB Docket Nos. ATO75281F1388 ATO75281F1403 ATO75281F1422 ATO75281F1429
DEPARTMENT OF TRANSPORTATION, FAA,	*	
Respondent.	*	

Decided: July 18, 1986

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the

petitioners' removal by the Federal Aviation Administration, Department of Transportation are affirmed.

OPINION

1. Bader

Petitioner Bader brings this appeal asking the court to order the board to reopen the record below for discovery concerning certain alleged secret settlements" entered into between the FAA and certain other air traffic controllers with situations allegedly similar to Bader. The recent opinion of Bergh v. Department of Transportation, FAA, App. No. 85-1102 (Fed. Cir. July 2, 1986), decides this issue and prevents us from granting Bader the requested relief, even assuming that the issue has been properly preserved for appeal as ably briefed by counsel for

petitioners.

2. Hale, Sanders, and Wagner

Petitioners Hale, Sanders and Wagner, in addition to raising the "secret settlements" issued disposed of above, seek reversal on grounds that they were misled by FAA officials, and on grounds that can collectively be characterized as confusion on the part of petitioners as to their deadlines. Given our precedents in Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984), and Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984), petitioners have each failed to convince us that the decision appealed from was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,

was obtained without procedures required by law, rule, or regulation having been followed, and was unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1982); see Hayes v. Department of the Navy, 727 F2d 1535, 1537 (Fed. Cir. 1984).

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYMOND G. BADER, et al.,	*	
Petitioners,	*	
v.	*	Appeal No. 85-1115
	*	ON MOTION FOR CLARIFICATION
DEPARTMENT OF TRANSPORTATION, FAA	*	
Respondent.		

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

ORDER

Respondent moves for clarification of the Court's unpublished opinion of July 18, 1986, in this case to relect that it disposes of the appeals of all petitioners in Appeal No. 85-1115. The motion states that Petitioner's counsel agrees that this should be made explicit by the Court.

The appeal in No. 85-1115 included 168 petitioners. Bader's appeal was selected as the "lead case" on the issue common to all petitioners (discovery of alleged secret settlements in similar cases), which was decided in the court's July 18, 1986 opinion against Bader.

On March 12, 1985, the court granted the motion of petitioners' counsel, consented to by respondent, designating four lead cases, including Bader, App. No. 85-1115, and suspending action to all others with common issues, pending decision in the lead cases. The pending motion makes it clear that the parties now agree to be bound as to all 168 petitioners by the July 18, 1986 opinion of the court in Bader, App. 85-1115. A list of the petitioners is made a part hereof.

The motion is granted.

FOR THE COURT

Date

Marion T. Bennett
Senior Circuit Judge

cc: Dan M. Norwood, Esq.
Sandra P. Spooner, Esq.

PETITIONERS

Baccus, Lindsey, C. Jr.	ATO75281F1769
Bader, Raymond C.	ATO75281F1388
Badgett, John N. III	ATO75281F1236
Baker, Ronald G.	ATO75281F1770
Ballard, Douglas E.	ATO75281F1772
Bastin, Rickie R.	ATO75281F1774
Belcher, Harold L.	ATO75281F1775
Bennett, Catherine P.	ATO75281F1776
Bennett, Larry W.	ATO75281F1777
Bice, William R., Jr.	ATO75281F1389
Bloodworth, Terry M.	ATO75281F0014
Boyd, Christy E.	ATO75281F1782
Boyd, William A., Jr.	ATO75281F1391
Brock, Gary D.	ATO75231F1784
Brooks, Ronald R.	ATO75281F1785
Brown, James D.	ATO75281F1786
Brown, Joseph W. II	ATO75281F1787
Buchanan, Larry D.	ATO75281F1789
Buck, Danny T.	ATO75281F1790
Buck, Marvin R.	ATO75281F1791
Bull, Donald L., Jr.	ATO75281F0015
Butler, David H.	ATO75281F1793
Caimotto, Terrence G.	ATO75281F1794
Calhoun, John K.	ATO75281F1392
Carden, Michael E.	ATO75281F1796
Cary, Richard M.	ATO75281F0078
Chase, Wayne S.	ATO75281F1798
Coleman, Charles E.	ATO75281F1803
Collins, Douglas A.	ATO75281F1394
Copeland, Myra J.	ATO75281F1804
Cosby, Jack H., Jr.	ATO75281F1805
Cox, Ronald G.	ATO75281F1807
Crocker, William E.	ATO75281F1808
Crockett, Walter S.	ATO75281F1395
Crouch, Charles M.	ATO75281F1809
Currin, Robert L.	ATO75281F1396
Cvitkovich, Carl A.	ATO75281F1812
Dearing, James V.	ATO75281F1817
Devall, Roger W.	ATO75281F1239
Dillard, Curtis M.	ATO75281F1820
Douglas, Nancy M.	ATO75281F1822

Douglas, Woodie A.	ATO75281F1823
Dyer, James C.	ATO75281F1824
Eatwell, George E.	ATO75281F1825
Egner, William E.	ATO75281F1827
Elliot, George D. III	ATO75281F1240
Embler, Donald M.	ATO75281F1241
Farrar, Robert D.	ATO75281F1398
Ferrer, Nancy T.	ATO75281F1829
Fournier, Paul P.	ATO75281F1399
Gilbert, Michael W.	ATO75281F1243
Gilliland, Wm. R., Jr.	ATO75281F1831
Glenn, James M.	ATO75281F1401
Goninan, Joseph P.	ATO75281F1832
Grayson, William V.	ATO75281F1834
Green, Danny W.	ATO75281F1835
Green, Glenn E. , Jr.	ATO75281F1402
Greene, Carolyn F.	ATO75281F1836
Grimes, David K.	ATO75281F1837
Guest, Dixie	ATO75281F1838
Guest, William M.	ATO75281F1839
Hale, Jimmy N.	ATO75281F1403
Hall, Kenneth D.	ATO75281F1841
Hall, Michael E.	ATO75281F1842
Hammack, Stanley G.	ATO75281F1844
Hanna, Richard F.	ATO75281F1244
Higbee, Terrence J.	ATO75281F1849
Hlavin, Warren E., Jr.	ATO75281F1850
Hobson, Raymond T.	ATO75281F1851
Holeman, Michael J.	ATO75281F1405
Holliman, Billie J.	ATO75281F1854
Holliman, Leonard	ATO75281F1855
Hould, Larry M.	ATO75281F1857
Howard, Eddie L.	ATO75281F1858
Hudson, John W.	ATO75281F1860
Huffman, Jerry M.	ATO75282F0017
Jackson, Thomas D.	ATO75281F1862
Jarvis, Joseph S., Jr.	ATO75281F1863
Jones, Devereaux B.III	ATO75282F0018
Justice, Charles M.	ATO75281F1866
Lepeard, Charles W.	ATO75281F1406
Long, Frank L.	ATO75281F1407
Loudakis, George	ATO75281F1872
Lowrance, Linda S.	ATO75281F1248

Magee, Louie G.	ATO75281F1874
Maloney, John M.	ATO75282F0106
Marsh, Steven W.	ATO75281F1876
Martel, Claude J.	ATO75281F1877
Martin, Arthur W.	ATO75281F1878
Martin, Helen J.	ATO75281F1249
Martin, Michael W.	ATO75281F1879
Massey, Mark W.	ATO75281F1409
McCaa, Clifford O.	ATO75281F1882
McCreight, John M. Jr.	ATO75281F1883
McIntosh, Joseph M.	ATO75281F1251
McKie, Jon W.	ATO75281F1885
Mercer, Joe M., Jr.	ATO75281F1886
Milsap, Jon D.	ATO75281F1889
Moody, John W.	ATO75281F1892
Morgan, Perry G.	ATO75281F1528
Morris, Philip E.	ATO75281F1893
Murray, Steven L.	ATO75281F1893
Mynatt, Roy A., Jr.	ATO75281F1412
Naanes, John M.	ATO75281F1413
Nash, Thomas E.	ATO75281F1896
Neighbors, Russell W.	ATO75281F1897
Nellums, William R.	ATO75281F1898
Nesbit, Timothy R.	ATO75281F1899
Nevares, Jose R.	ATO75281F1900
Nicholson, John F., Jr.	ATO75281F1902
Nutt, Doyle T., Jr.	ATO75281F1905
Odum, Virgil B., Jr.	ATO75281F1906
Peden, Max S.	ATO75281F1913
Pendley, Steven C.	ATO75281F1914
Pirkle, Tony C.	ATO75281F2060
Poston, Robert D.	ATO75281F1918
Prewitt, Stephen E.	ATO75281F1919
Pryse, William C.	ATO75282F0118
Pumphrey, William D.	ATO75281F1418
Rawls, Byron W.	ATO75281F1920
Reed, Marshall R.	ATO75281F1921
Render, Terrence M.	ATO75282F0021
Reynolds, D. J.	ATO75281F1419
Rickvalsky, William A.	ATO75281F1924
Roberts, Kay P.	ATO75281F1925
Rodgers, Ray N.	ATO75281F1926
Ross, Leslie D.	ATO75281F1421

Rowsey, Wm. F., Jr.	ATO75282F0022
Russell, Thurman D.,Jr.	ATO75281F0023
Sanders, Philip M.	ATO75281F1422
Sanford, Robert M.	ATO75282F0024
Scheffell, Nathan R.	ATO75281F1928
Scott, Edwin G.	ATO75281F1423
Sedgwick, Ralph C.	ATO75281F1424
Selvey, James R.	ATO75281F1929
Stechfield, Daniel G.	ATO75281F2062
Shell, David L.	ATO75281F1930
Smith, Dennis C.	ATO75282F0100
Sniegowski, Mark	
Spurlin, Larry E.	ATO75281F1935
Stallings, James M.	ATO75281F1936
Stewart, George A.	ATO75282F0073
Stewart, Glen W., Jr.	ATO75281F1938
Sutton, Harry D.	ATO75281F1940
Sykes, Don J.	ATO75281F1942
Teems, Ronald J.	ATO75282F0026
Tempelmeyer, Reginald	ATO75281F1944
Titus, David C.	ATO75281F1427
Wagner, Joseph C. Jr.	ATO75281F1429
Walden, James V.	ATO75281F1948
Walker, Jeffrey L.	ATO75281F1949
Warren, Patricia H.	ATO75281F1951
Watkins, Randall L.	ATO75281F1952
Weaver, Buford R.	ATO75281F1953
Webb, Jimmy W.	ATO75281F1954
Weik, Gary J.	ATO75281F1956
Welch, Earl M., Jr.	ATO75281F1432
Welch, Larry W.	ATO75282F0027
White, Ernest B., Jr.	ATO75281F1958
Wichert, George C., Jr.	ATO75281F1959
Wilder, John W.	ATO75281F1433
Wilder, Stanley R.	ATO75281F1434
Williams, Charles D.	ATO75281F1961
Williams, Robert E.	ATO75281F1435
Wright, Glenn T.	ATO75281F1964
Young, Brenda M.	ATO75281F1966
Young, Robert J.	ATO75281F1436
Zauche, Stephen R.	ATO74281F1968

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

RAYMOND E. BADER, ET AL.	*	CASE NO. *ATO75281F1388
HUGH A REYNOLDS,	*	CASE NO. *ATO75281F0674
THOMAS G. PERRY and	*	CASE NO. *ATO75281F1471
ROGER DE VALL	*	CASE NO. *ATO75281F1817
	*	
v.	*	
	*	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,	*	

OPINION AND ORDER

This case is before the Board on petitions by the agency and by appellant Roger W. DeVall. 1 The agency asserts in its petitions that the previsind official erred in finding that it suspended appellants during their removal notice periods when it maintained them in a nonduty, nonpay status from the dates of their removal proposal notices until the

effective dates of their removals. Upon consideratin of the agency's petitions, the Board hereby GRANTS review.

The Board held in Martel v. Department of Transportation, MSPB Docket No. BNO75281F0558 at 6-7, 11-12 (April 25, 1983), that in order to meet his burden of establishing jurisdiction over an alleged suspension during the notice period under 5 C.F.R. Section 1201.56(a)(2), an appellant must prove by preponderant evidence that the action was involuntary and disciplinary in nature, and that the employee was ready, willing, and able to work during the period of time in question. The last of the three criteria cannot be established without evidence tht the appellant contacted an agency official with

decision-making authority, in person or otherwise, and unequivocally notified the official that he was ready, willing, and able to return to work. Id. at 11. Such a showing effectively establishes, without additional evidence, that the agency's action or inaction in continuing to maintain appellant in a nonduty, nonpay status during the notice period was involuntary on appellant's part and disciplinary in nature on the agency's part. Id. at 12.

In the instant cases, a thorough review of the records shows no evidence that any appellant had contacted an agency official and unequivocally notified such official that he was ready, willing and able to work. The Board finds that appellants were not entitled to be placed on a duty and pay status during the notice

period.

Accordingly, the initial decisions dated January 13, 1983 and January 25, 1983 are REVERSED as to the presiding official's finding that the agency suspended appellants from the dates of their respective notices of proposed removals through the effective dates of their removals.

Petitioner Roger W. DeVall asserts that he has additional evidence which the presiding official declined to review because it was not filed before the record closed. The additional evidence consists of a letter from the appellant to his Congressman dated approximately one month after the hearing, a character reference letter from a co-worker and the Congressman's response letters. The contents of the letter to the Congressman are elaborations of his

defenses. Inasmuch as the appellant had an opportunity at the hearing to elaborate on his defenses, the letters filed by the appellant do not constitute new and material evidence that, despite due diligence, was not available when the record was closed. Avansino V. U. S. Postal Service, 3 MSPB 308, 310 (1980).

Moreover, since the arguments made in the appellant's letter to the Congressman do not meet the criteria for review set forth at 5 C.F.R. Section 1201.115 2 , the Board hereby DENIES the petition.

This is the final ordedr of the Merit Systems Protection Board in these appeals. The initial decisions shall become final five (5) days from the date of this order. 5 C.F.R. Section 1201.113(b).

The appellants are hereby

notified of the right under 5 U.S.C. Section 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

_____ _____

Date Robert E. Taylor
Secretary

Washington, D. C.

_____

FOOTNOTES

1. Appellant Hugh A. Reynolds was employed at Jackson, Mississippi, and appellant Thomas C. Perry was employed at West Memphis, Arkansas. Perry's appeal was appropriately submitted to the Board's Dallas Regional Office, but on motion of the appellant, venue was changed. The appeals of other appellants whose appeals were included in the consolidated hearing (Raymond E. Bader, et al. v. Department of Transporatation, Federal Aviation Administration) are addressed in separate decisions.

2. The appellants denied receiving the notice from the agency that a strike was in progress and the agency furnished no evidence showing that delivery of the notices was effected.

3. A message to return a telephone call was left with the appellant's wife on August 2, 1981.

4. Because the Board lacks jurisdiction over back pay issues, I make no finding with respect to that matter. See Ritchey v. U. S. Postal Service, MSPB Dkt. No. PHO752801054 (April 2, 1982). Pursuant to 31 U.S.C. § 71, back pay disputes are to be resolved by the Office of the Comptroller General.

5. As modified by § 127 of the Federal Cout Improvement Act of 1982, to be codified at 28 U.S.C. § 1209(a)(9).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
RAYMOND E. BADER, ET AL,	*	
	*	DECISION NUMBER:
Appellants,	*	See Attachment A
	*	Date:
	*	Jan. 13,1983
v	*	
	*	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,	*	
	*	
Agency.	*	

INTRODUCTION

By separate petitions, the appellants submitted timely appeals to the Atlanta Regional Office of the Merit Systems Protection Board. The appeals are from administrative actions taken by the Federal Aviation Administration (FAA) which resulted in the removal of each appellant from the position of Air Traffic Control Specialist at the Air Route Traffic Control Center, Memphis, Tennessee.

Because the issues are substantially the same, the appeals have been consolidated. 5 U.S.C. § 7701(f)(1); 5 C.F.R. § 1201.36(a)(1). Each appellant requested a hearing and a hearing on the consolidated appeals was held on October 18, 19, 20, and 21, 1982, at Memphis, Tennessee.[1]

At the time of the removal action, each appellant was an employee as defined by 5 U.S.C. § 7511(a)(1)(A) and a removal is an action covered by 5 U.S.C. § 7512. Accordingly, the appeals were accepted for adjudication on the basis that they are within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. 7513(d) and 5 U.S.C. § 7701.

FINDINGS OF FACT AND CONCLUSIONS

The burden of proving the charges on which an adverse action is based rests with the agency taking such action and the agency decision must be supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(ii). This standard must be applied to every element of proof of the agency's case. See In Re: William F. Van Sciver, 1 MSPB 94 (1979). The agency must establish that the action was taken for such cause as will promote the efficiency of the service and that the disciplinary sanctions imposed are for reasons relevant to this standard. Douglas v. Veterans Administration, MSPB Dkt. No. AT075299006 (April 10, 1981). The appellants have the burden of proof with respect to any affirmative defenses described in 5 U.S.C. § 7701(c)(2). See 5 C.F.R. § 1201.56(b).

Each appellant was advised in a written notice of his proposed removal, based on the following reasons:

Reason 1: Violation of 5 U.S.C. § 7311 which states

in pertinent part, "an individual may not accept or hold a position in the Government of the United States if he ...participates in a strike against the Government of the United States..." and 18 U.S.C. § 1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

Reason 2: Unauthorized absence.

In a specification set out under Reason 1, the agency noted that beginning at approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred; noted the time and date each first failed to report for duty; and concluded that because each appellant had failed to report for his scheduled tour of duty on or after August 3, 1981,to the date of the notice, that employee participated in a strike against the United States.

In a specification set out under Reason 2, each appellant was advised of the time and date his unauthorized absence commenced based on his failure to report for his scheduled tour of duty. The specification noted that each had been sent a notice that an illegal strike was in progress, and that he must return for duty; but that each failed to return to duty.[2] The Board has taken official notice (subject to refutation) of the fact that a strike called by the now

decertified Professional Air Traffic Controllers Organization (PATCO) commenced on August 3, 1981, and continued through August 6, 1981, and that the strike was illegal. Ketchem v. Department of Transportation, MSPB Dkt. No. DA075281F0713 (May 28, 1982).

In support of the charges concerning each appellant, the agency furnished copies of agency personnel logs (facility sign-in sheets) and Memphis Tower Personnel Schedules reflecting, in pertinent part, (for the period of August 3, 1981 through approximately August 11, 1981) that each appellant was scheduled for a shift assignment or assignments during that period of time, but that each failed to report for his or her shift assignment.

The appellants have not refuted the fact of the strike as officially noticed by the Board in Ketchem, supra. In light of the appellant's undisputed absences from scheduled shift assignments during the period of August 3, 1981 through August 6, 1981, I find that such absences constitute prima facie evidence of the appellants' voluntary participation in the strike.[3] Thus, the burden of persuasion now shifts to the appellants to rebut the agency's case by presenting evidence showing a lack of knowledge as to the existence of the strike or that their absence was due to some reasons other than intentional participation in the strike. Schapansky v. Department of Transportation, MSPB Dkt. No. DA075281F1130 (October 28, 1982).

Facility Chief Phillip L. Lofton testified that as a result of a

Presidential decree (Agency Hearing Exhibit No. 6), striking emloyees were allowed to return to work if they reported for their first scheduled shift on or after 11:00 a.m. EDT on August 5, 1981. Lofton also testified that prior to the strike, all employees were advised in briefings by team supervisors and in briefings he conducted, that participation in a strike against the Government was proscribed activity and that, in the event of a strike, all leave would be cancelled. (Tr. 103-104). Lofton added that on July 27, 1981, Facility Order No. 7110.60, the Memphis Tower Job Action Plan (Agency Exhibit No. 11 and also included under Tab 13 of the file furnished by the agency regarding each appellant) was issued, distributed, and posted, as required reading by all employees. He added that supervisors also briefed employees concerning the requirements of that Facility Order, notified employees that in the event of a job action [strike], all leave would be cancelled and that employees would be expected to contact or to report to the facility immediately, regardless of past schedules or regular days off (RDO'S).

Lofton testified that all but three appellants (Hale, Ross, and Williams) were briefed on Facility Order No. 7110.60 and that because those three had not been briefed on the Order the provisions of the Order were not applied to them.

That each appellant failed to report for the shift assignment as set out in his notice of proposed removal and that each remained absent through the

time and date of his or her agency determined deadline is undisputed. Further, the evidence, as reflected in the testimony of Lofton, reveals that none of the appellants contacted the tower or reported for duty prior to the deadline afforded striking employees as the result of the Presidential decree. The undisputed evidence also shows that none of the appellants, except Collins, Hale, Sanders, Welch, and Wagner, offered any explanation for their absences. Other appellants did claim in their February 24, 1982 submissions which included affirmative defenses, that leave during the week of August 3 was an issue, but furnished no evidence in support of that contention.

Because of the operational emergency brought about by the strike, in which a majority of the employees failed to report for scheduled shift assignments, it was within the agency's authority to cancel previously approved leave, in order to alleviate the disruptive effect on the agency's ability to meet its responsibility for aviation safety.

With respect to appellant Collins, the uncontroverted evidence shows that he failed to report for scheduled shifts on August 3, 4, and 5, 1981, but that because his first scheduled shift after the Prsidential deadline did not commence until August 8, 1981, he had until that date to report. The unrefuted evidence also shows that Collins had previously scheduled annual leave for August 8, 1981, but that on July 28, 1981, he had been notified in a supervisory briefing on Facility Order No. 7110.60 that in the

event of a job action, any approved leave would be cancelled. (TR. 98-99). Collins furnished no explanation for his failure to report for his August 3 through August 5, 1982 assigned shifts. Further, because of Facility Order No. 7110.60, the appellant knew, or should have known, that any approved leave had been cancelled.

With respect to appellant Hale, the evidence shows that he originally had approved annual leave and regular days off from July 17, 1981 through August 9, 1981. The evidence also shows that because Hale was absent on approved leave at the time of the issuance of Facility Order No. 7110.60 and the briefing on that Order, he was allowed until August 10, 1981 to report for work (his next regularly scheduled shift) but that he failed to report on that date. Accordingly, Hale was charged with unauthorized absence and strike participation commencing August 10, 1981.

Lofton testified (Tr. 259-260) that based on his review of notes of telephone calls to the facility, Hale telephoned on August 7, 1981; talked with Deputy Chief Schasser who requested the appellant to report for work on August 10; that the appellant gave an affirmative response to Schasser's request; and that the appellant was notified that he was considered AWOL and a strike participant.

Hale testified that while he was on a camping trip he learned of the strike. He acknowledged that he telephoned and talked with Schasser on

August 7, 1981 but denied that Schasser told him to report for work on August 10, 1981; and, at the hearing, for the first time, claims that his failure to report on August 10, 1981 was because Schasser told him in the August 7 telephone conversation that the appellant's termination papers were being processed. Because the appellant had not previously raised the issue of deception and misinformation with the agency, in his petition of appeal to the Board, or as an affirmative defense in compliance with the Board's February 4, 1982 Order requiring that such claims be filed with the Board by February 25, 1982, I find that the appellant's explanation lacks credibility. The appellant acknowledged that Schasser told him he could come in on August 10, 1982, and talk, but furnished no explanation why he did not take advantage of such an offer. I find this incredible in light of the fact that the appellant essentially claims he was not a striker.

The appellant was scheduled to work on August 10, 1981 following the expireation of his approved leave, but did not report. The appellant does not contend that Schasser told him he could not report for work on August 10, 1981. In my view, the more credible explanation is that Hale's absence, commencing on August 10, 1981, was in support of the strike, and I so find. Appellant Sanders was charged with AWOL and strike participation commencing at 1:00 p.m. on August 3, 1981. The evidence, concerning Sanders, reflects that he had leave scheduled for August 3 and 4, 1981, but that as a result of the

strike, Sanders' leave was automatically cancelled in accordance with Facility Order 7110.60. In his response to agency interrogatories, Sanders acknowledged that on August 3, 1981, he was aware that a strike was in progress. Lofton's testimony that Sanders was briefed on Facility Order 7110.60 was not disputed by Sanders. Accordingly, Sanders knew, or should have known, that his leave was cancelled and of his obligation to report for work or contact the facility.

Appellant Welch (whose agency-determined deadline was August 6, 1981, at 3:15 p.m.) was charged with AWOL and strike participation commencing at 6:45 a.m.. on August 3, 1981. In his response to the notice of proposed removal, Welch claims that he had approved annual leave and regular days off from August 4 through August 12, 1981, but furnished no explanation for his August 3 absence, nor did he furnish any explanation concerning August 3 in his statement of issues, facts and affirmative defenses which was filed in response to the February 4, 1982 Order by the Board's Atlanta Regional Office. It is noted that in his May 27, 1982 response to agency interrogatories, (which was submitted by the agency) the appellant claimed that he was scheduled for a familiarization flight [4] on August 3, 1981. However, the evidence does not show, and the appellant does not claim, that he took a familiarization flight on that date.

Thus, Welch's August 3 absence from work is unexplained. Further, the undisputed evidence reflects that that

appellant was briefed on Facility Order No. 7110.60 and, therefore, knew, or should have known, that his annual leave commencing on August 4, 1981 was cancelled.

Appellant Wagner was charged with AWOL and strike participation commencing at 11:00 p.m. on August 4, 1981. Wagner's agency-determined deadline was August 8, 1981, at 4:00 p.m. The evidence, with respect to Wagner, reveals that he had annual leave scheduled for August 3, 1982, but as a result of Facility Order No. 7110.60, that leave was cancelled by the agency when the strike occurred. The appellant testifed that he was out of town on August 3 and 4 and that he returned to Memphis on August 6, 1982. He claims that on August 2, 1982 he obtained approval for annual leave on August 4, 1982, but furnished no evidence to corroborate that claim. Contrary to the appellant's assertion, the agency's shift assignment schedules (watch schedules) and personnel logs do not reflect that he had obtained leave approval from his scheduled shift assignment commencing at 11:00 p.m. on August 4, 1981. The appellant acknowledged that he was aware, on August 3, 1981, that a strike was in progress but that he did not contact thefacility as directed (TR. 755-756) and that he did not attempt to return to work thereafter (Tr. 757). He acknowledged that he participated in a strike (Tr. 760) and that a facility order had been issued cancelling leave in the event of a strike (Tr. 762).
Thus, the evidence shows that as a result of the facility order cancelling leave, the appellant's

leave had been cancelled and that the appellant knew of his responsibility to report to the facility, but failed to report.

While the evidence shows that agency guidelines and advice concerning deadlines may have been interpreted differently by various facility chiefs, the evidence showed that each facility chief equitably applied the guidelines at his facility. Thus, the fact that the Jackson, Mississippi Facility Chief determined that employees' dealines occurred after any previously approved leave had expired does not mean that other facility chiefs were required to adopt that policy.

The appellants argued that they considered themselves terminated as of 11:00 a.m. EDT on August 5, 1981, based on the President's August 3, 1982 message. The appellants also claim that the agency was remiss in failing to notify them of an extended deadline to return to work as a result of the Presidential "amnesty" or that there was confusion concerning deadlines.

Any reporting deadline confusion by the appellants could have been avoided or resolved by reporting to or contacting the facility by 11:00 a.m. on August 5, 1982, if the appellants in fact perceived that to be their reporting deadline; however, none of the appellants elected to pursue such a course of action. While the agency did not communicate to each appellant his specific deadline which was based on its liberal construction and application of President Reagan's

48-hour "amnesty", the agency was under no obligation to convey that information. Each appellant's absence was a matter of his individual choice. It was not the agency's responsibility to seek out and attempt to persuade each appellant to report for work. Thus, I find that those appellants who now contend that they failed to report for duty because of a confusion about a deadline, if there was in fact confusion, did so as the result of their own irresponsibility and not the result of any agency nonfeasance.

Based on the appellant's established unauthorized absences and the prima facie case of strike participation which the appellants have not successfully rebutted, I find that the preponderance of the evidence supports the charges. Because the evidence discloses that once an employee missed his reporting deadline, the employee was not, or would not be permitted to return to duty, absent an acceptable excuse for being absent, I conclude that the chargeable unauthorized absence and strike participation extended only through the deadline for each employee.

With respect to appellants Hale and Williams, I find that their chargeable absences which commneced after August 6, 1982, but while strike related activities, such as picketing continued, also constituted strike participation because of their unauthorized absences during a period of time in which the evidence shows they could have returned and were expected to report for work because of their schedules.

The appellants contend that the agency committed certain procedural errors.. An agency's decision may not be sustained if it is shown that harmful error in the application of the agency's procedures at arriving at such a decision occurred. 5 U.S.C. § 7701(c)(2)(A). The burden is upon an appellant to establish, as an affirmative defense, that there was error and that it was harmful. Parker v. Defense Logistics Agency, 1 MSPB 489, 492 (1980). Harmful error is defined in the Board's regulations 5 C.F.R. § 1201.56(c)(3) as "error which might have caused the agency to reach a conclusion different than the one reached." In deciding whether such error rises to that standard, the Board found that it is helpful to consider:

> "whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, the decisive factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error." Id. at 493.

The appellants first claim that they were improperly denied 30 days' advance notice of the proposed removal actions. The law provides that an employee against whom an action is porposed is entitled to at least 30 days' advance written notice, unless there is reasonable cause to believe

the employee has committed a crime for which a sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Because 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because the appellants were absent without authorization or notice from work during the strike, the agency had reasonable cause to believe the appellants had committed a crime for which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified and I find no error with respect to this matter. Schapansky, supra at 8.

The appellants furnished no evidence in support of their claim that statutes prohibiting strikes by federal employees are unconstitutional and the Board has concluded otherwise. Ketchem, supra, at 5, with pertinent case law citations at footnote 12.

The appellants also contend that they were improperly denied a minimum of 7 days in which to orally respond to the charges. An employee against whom an adverse action is proposed is entitled to a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer. 5 U.S.C. § 7513(b)(2).

A review of the record reveals that in most cases, oral responses by the appellants were heard by the agency official on the seventh day or later, after receipt of the notice of proposed removal [5]. In Parker, supra,

at 492, the Board, in keeping with Congressional intent as to when procedural error is to be considered to be reversible error, found that the statute clearly places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful.

In Ratley vs. Department of the Army, MSPB Dkt. No. AT07528110338 at 5, (September 17, 1982), the Board held as follows:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. (footnote omitted).

Ratley can be read as holding that less than seven days to reply to an advance notice is per se harmful procedural error because seven days is mandated by law. Upon examination of the law and Board Orders, however, Ratley stands as inconsistent. Nowhere in the law are procedural errors reversible errors because they are "not in accordance with the law". It is the agency's decision to take disciplinary action that cannot be sustained by the Board if it is not in accordancce with law. 5 U.S.C. § 7701(c)(2)(C). Within that same section of the statute, Congress provides that agency decisions cannot be sustained if the appellant shows

harmful error in procedures used to effect the action. 5 U.S.C. § 7701(c)(2)(A). If errors in procedures mandated by statute are considered harmful *per se*, absurd results could ensue. For example, when an agency does not give an employee specific reasons for an imposed disciplinary action, but the record shows that the appellant was aware of the reasons for the discipline, or if an agency gives an employee only 29 days rather than the statutorily mandated 30 days' advance notice. *Cf.* *Cade v. U.S. Postal Service*, MSPB Dkt. No. SF07528010370 (November 30, 1981) (the Board found that a failure to afford the appellant the full period of time required is not reversible error absent a showing of harmful error by the appellant); *Gallego v. Department of the Navy*, MSPB Dkt. No. SF07528110759 (July 21, 1982) (shortening the notice period by seven days was error but that it did not warrant reversal of the removal action under 5 U.S.C. § 7701(c)(2)(A)).

While twenty nine of the appellants plead harmful error with respect to the fact they received less than seven days to make an oral reply, they have not shown harm. Accordingly, I find that any shortened oral response period had no effect on the agency decision and, therefore, conclude that such does not constitute harmful error.

The next claim of harmful error made by the appellants is that they were unlawfully suspended during the pendency of the removal actions. The agency acknowledged that the

appellants were placed in a non-duty and non-pay status during the notice period.

A "suspension" is defined as the placing of an employee in a temporary status without duties and pay for disciplinary reasons. 5 U.S.C. §§ 7501(2) and 7511(2). It is apparent that the agency considered it contrary to its best interest to return the appellants to a duty status during the notice period. However, the agency has offered no explanation for failing to retain the appellants in a pay status. A suspension of more than 14 days must be taken in accordance with the procedures set out in 5 U.S.C. § 7513 which includes, inter alia, an advance written notice and a right to reply to the proposed action. It is clear from the record that the agency did not furnish the appellants with a notice of proposed suspension nor furnish them with an opportunity to reply thereto. Accordingly, I find that the agency's de facto suspension actions were effected without regard for the requirements of 5 U.S.C. § 7513 and, therefore, cannot be sustained.[6] See Cuellar v. U.S. Postal Service, MSPB Dkt. No. SF075299045 (November 13, 1981).

The appellants also contest the fact that they were denied requests for extensions of time in which to provide their responses to the proposed removal actions, but provided only speculation of harmful error in that regard. Thus, the appellants have failed to carry the burden of proof with respect to the claim of harmful error in connection with that matter. Nevertheless, on my review of the

record, the claims made by the appellants, and the circumstances wherein the majority of the facility's workforce was absent from scheduled shifts, I find that the appellants were afforded a reasonable time to review the material relied on to support the proposed removals and to respond to the proposed actions. Accordingly, I find no error with respect to the agency's decision to deny these requests for time extensions.

The appellants also claim harmful error based on the fact that their requests for certain documentary material, during and after their oral presentations, was not then provided. However, the appellants have not shown how that material, some of which had been previously furnished or made available and some of which was subsequently obtained through discovery proceedings, would have had any effect on the agency decision. Accordingly, I find no error with respect to this matter. Even if it was error, it is not shown to be harmful.

The appellants next claim that the agency evidence concerning the charges, should have been limited, at the hearing, to that material and evidence provided prior to the hearing.

A proceeding before the Board is a de novo proceeding, and the Board may consider all the relevant evidence presented by both parties. Nothing in the law or in the Board's regulations restricts an agency to reliance upon its documentary administrative

record. Ziess v. Veterans Administration, MSPB Dkt. No. NY0752090l7 (September 1, 1981). See also Chavez v. Office of Personnel Management, MSPB Dkt. No. DA831L09003 at 13-14 (May 28, 1981). Thus, contrary to the appellant's claim, the agency evidence of picketing activity, PATCO membership, and strike support activities constituted admissible evidence relating to strike participation.

The appellants also contend that the removal actions were pre-determined as the result of statements by public officials, including President Reagan, that strikers would be fired. However, the evidence shows that each appellant was afforded the opportunity to respond to the charges against him, but that few furnished any explanation for their absences. The evidence, as reflected by the testimony of Lofton, reveals that individual consideration was given to each appellant's case and that Lofton had the authority to decide each case based on individual circumstances. Thus, the appellants' assertion that the actions were pre-determined is not supported by the evidence presented.

The appellants contend that the agency actions against them constituted a prohibited personnel practice, specifically claiming that they were treated unequally when certain employees were allowed to return to work, because of varying deadlines. However, the appellants have not pointed out any instance where similarly situated emloyees were treated differently; i.e., there is no evidence showing that any employees

not taking advantage of the Presidential "amnesty" were allowed to return to work. Thus, the appellants' have failed to show unequal or disparate treatment.

Contrary to the appellant's claim, the evidence presented does not reveal the removal actions were a violation of the Merit System principles set out in 5 U.S.C. § 2301. Any failure of the agency to consider appellants' work performance, ability, aptitude, and general qualifications, is of no consequence since those matters are irrelevant to the charges on which the removal actions were based. The appellants also claim that the removal actions were taken against them as reprisal for their disclosure of violations of laws, rules, and regulations; mismanagement; gross waste of funds; abuse of authority; and substantial danger to public safety. However, the evidence, as revealed in the testimony of agency officials, reveals the sole reasons for the removal actions were as set out in the letters of proposed removal, specifically, AWOL and strike participation. Accordingly, I find no merit in the appellants' claim of reprisal.

The appellants also claim that the agency prohibition against their reemployment with the agency and their inability to compete with others for employment, because of the stigma of their removal, constitutes a prohibited personnal practice; however, those matters are not subject to my review in this decision. Contrary to the appellants' assertion, I find that any subsequent settlement

of appeals concerning other former air traffic controllers removed for striking and AWOL is irrelevant to the issues in the instant appeals.

Nexus may be presumed where there is a "clear and direct relationship" between such misconduct and both the "employees ability to accomplish his . . . duties satisfactorily" and "the agency's abitlilty to fulfill its mission". Doe v. Hampton, 566 F.2d 265, 272, n. 20 (D.C. Cir. 1977); see also Bonet v. U. S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981).

Because of the intentional disruptive effect of the strike on the agency mission, caused by the appellants' absences in support of a strike, I find no basis for mitigating the penalty of removal, notwithstanding the appellants' prior favorable employment record.

Removal of an air traffic controller for proven participation in a strike against the Federal government is an appropriate penalty and promotes the efficiency of the service. Johnson v. Department of Transportation, MSPB Dkt. No. DCO75281F0998 at 16 (November 10, 1982); Schapansky, supra, at 10-11. Since removal is found to be appropriate in these cases, it is unnecessary for me to determine the correctness of the agency's assertion that removal of a striking employee is mandated by statute.

DECISION

The removal actions are AFFIRMED. The agency is ORDERED to amend the records to show each appellant in a pay status

from the date of the notice of proposed removal through the effective date of the removal action.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 17, 1982, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petitioin for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue,. N. W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon the erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1) [7], the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

S. F. VESSER
Presiding Official

ATTACHMENT A

Raymond G. Bader	ATO75281F1388
William R. Bice, Jr.	ATO75281F1389
William A. Boyd, Jr.	ATO75281F1391
John K. Calhoun	ATO75281F1392
Douglas A. Collins	ATO75281F1394
Walter S. Crockett	ATO75281F1395
Robert L. Currin	ATO75281F1396
Robert D. Farrar	ATO75281F1398
Paul P. Fournier	ATO75281F1399
James M. Glenn	ATO75281F1401
Glenn E. Green, Jr.	ATO75281F1402
Jimmy N. Hale	ATO75281F1403
Michael E. Holeman	ATO75281F1405
Charles W. Lepeard	ATO75281F1406
Frank L. Long	ATO75281F1407
Mark W. Massey	ATO75281F1409
Perry G. Morgan	ATO75281F1528
Roy A. Mynatt, Jr.	ATO75281F1412
John M. Naanes	ATO75281F1413
William D. Pymphrey	ATO75281F1418
D. J. Reynolds	ATO75281F1419
Leslie D. Ross	ATO75281F1421
Phillip M. Sanders	ATO75281F1422
Edwin G. Scott	ATO75281F1423
Ralph C. Sedgwick	ATO75281F1424
David C. Titus	ATO75281F1427
Joseph C. Wagner, Jr.	ATO75281F1429
Earl M. Welch, Jr.	ATO75281F1432
John W. Wilder	ATO75281F1433
Stanley R. Wilder	ATO75281F1434
Robert E. Williams	ATO75281F1435
Robert J. Young	ATO75281F1436

FOOTNOTES

1. The name of each appellant to whom this dec listed in Attachment A. The appeals of other appeals were included in the consolidated addressed in seperate decisions.

2. The appellants generally denied receiving the agency that a strike was in progress furnished no evidence showing that delivery of effected.

3. For the reasons discussed infra, appe Williams, whose absences commenced after Augu included.

4. A "familarization flight" is a practice in fly on a scheduled commercial flight for "fa "training" purposes to better acquaint control flight conditions.

5. At his request, appellant Phillip M. Sande was made one day after he received the nc removal.

6. Because the Board lacks jurisdiction over ba make no finding with respect to that matter. S S. Postal Service, MSPB Dkt. No. PJO7528010154 Pursuant to 31 U.S.C. § 71, back pay disputes a by the Office of the Comptroller General.

7. As modified by § 127 of the Federal Court I 1982, to be codified at 28 U.S.C. § 1209(a)(9).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
RAYMOND E. BADER, et al,	*	Decision No:
	*	See Attachment
Appellants,	*	A
	*	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION	*	Date: Jan 13, 1983
	*	
	*	
	*	
Agency.	*	

INTRODUCTION

By separate petitions, the appellants submitted timely appeals to the Atlanta Regional Office of the Merit Systems Protection Board. The appeals are from administrative actions taken by the Federal Aviation Administration (FAA) which resulted in the removal of each appellant from the position of Air Traffic Control Specialist at the Air Traffic Control Tower, Memphis, Tennessee.

Because the issues are substantially the same, the appeals have been consolidated. 5 U.S.C. § 7701(f)(1); 5 C.F.R. § 1201.36 (a)(1). Each appellant requested a hearing and a hearing on the consolidated appeals was held on October 18, 19, 20 and 21, 1982 at Memphis, Tennessee. [1]

JURISDICTION

At the time of the removal action, each appellant was an employee as defined by 5 U.S.C., § 7511 (a)(1)(A) and a removal is an action covered by 6 U.S.C. § 7512. Accordingly, the appeals were accepted for adjudication on the basis that they are within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. § 7513(d) and 5 U.S.C. § 7701.

FINDINGS OF FACT AND CONCLUSION

The burden of proving the charges on which an adverse action is based rests with the agency taking such action and the agency decision must be supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 U.S.C. § 1201.56(a)(ii). This standard must be applied to every element of proof of the agency's case. See In re: William F. Van Sciver, 1 MSPB 94 (1979). The Agency must establish that the action was taken for such cause as will promote the efficiency of the service and that the disciplinary sanctions imposed are for reasons relevant to this standard. Douglas v. Veterans Administration, MSPB Dkt. No. ATO75299006 (April 10, 1981). The appellants have the burden of proof with respect to any affirmative defenses described in 5 U.S.C. § 7701(c)(2). See 5 C.F.R. § 1201.56(b).

Each appellant was advised in a written notice of his proposed removal, based on the following reasons:

> Reason 1: Violation of 5 U.S.C. § 7311 which states in pertinent part, "an individual may not accept or hold a position in the Government of the United States if he . . . participates in a strike against the Government of the United States . . . " and 18 U.S.C. § 1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> Reason 2: Unauthorized absence.

In a specification set out under Reason 1, the agency noted that beginning at approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred, noted the time and date each first failed to report for duty; and concluded that because each appellant had failed to report for his scheduled tour of duty or or before August 3, 1981, to the date of the notice that employee participated in a strike against the United States.

In a specification set out under Reason 2, each appellant was advised of the time and date his unauthorized absence commenced based on his failure to report for his scheduled tour of duty. The specification noted that each had been sent a notice that an illegal strike was in progress and that he must return for duty; but that each failed to return to duty. 2 The Board has taken official notice

(subject to refutation) of the fact that a strike called by the now decertified Professional Air Traffic Controllers Organization (PATCO) commenced on August 3, 1981, and continued through August 6, 1981, and that the strike was illegal. Ketchem v. Department of Transportation, MSPB Dkt. No. DA075281F0713 (May 28, 1982).

In support of the charges concerning each appellant, the agency furnished copies of facility sign-in logs, shift assignment sheets, and time and attendance records reflecting, in pertinent part, that each appellant was scheduled for a shift assignment or assignments during the period of August 3, 1981 through August 6, 1981, but that the appellants failed to report for a shift assignment or assignments during that period of time.

The appellants have not refuted the fact of the strike as officially noticed by the Board in Ketchem, supra. In light of the appellants' undisputed absences from scheduled shift assignments during the period of August 3, 1981 through August 6, 1981, I find that such absences constitute prima facie evidence of the appellants' voluntary participation in the strike. Thus, the burden of persuasion now shifts to the appellants to rebut the agency's case by presenting evidence showing a lack of knowledge as to the existence of the strike or that their absence was due to some reason other than intentional participation in the strike. Schapansky v. Department of Transportation, MSPB Dkt. No. DA075281F1130 (October 28, 1982).

Facility Chief William W. Parker testified that as a result of a Presidential decree (Agency Hearing Exhibit No. 6), striking employees were allowed to return to work if they reported for their first scheduled shift on or after 11:00 a.m. EDT on August 5, 1981. Parker also testified that employees were briefed in late May and early June 1981 regarding a letter from FAA Administrator Helms about the illegality of a strike; briefed again on approximately June 15, 1981 that striking was illegal and that if a strike occurred, all leave was cancelled; and that notices 3 were issued and posted in required reading locations and on bulletin boards, on July 29 and 30, 1981, with attendant supervisory briefings, notifying employees that all leave was cancelled in the event of a strike. Parker's testimony concerning the briefings and bulletins was unrebutted by the appellants.

That each appellant failed to report for the shift assignment as set out in his notice of proposed removal and that each remained absent through the time and date of his or her agency determined deadline is undisputed. Further, the evidence, as reflected in the testimony of Parker, reveals that none of the appellants contacted the facility for a shift assignment or reported for duty prior to the deadline afforded striking employees as the result of the Presidential decree.

The undisputed evidence also shows that while some appellants attributed their absences to being on approved

leave, most offered no explanation for their absences. Because of the briefings and notices to employees that leave was cancelled in the event of a strike, I conclude tha the appellants knew, or reasonably should have known, of their responsibility to report for work or, to contact the facility in the event of a strike. The appellants who contend that leave was an issue either admitted, in their responses to interrogatories (Agency Hearing Exhibit No. 10), that they were aware a strike commenced on August 3, 1981, or were among the number of controllers observed picketing during the first days of the strike. Thus, the undisputed evidence shows that each of the appellants was aware of the strike.

Although the appellants argue that Parker was without authority to cancel leave, I conclude otherwise. Because of the operational emergency brought about by the strike, in which a majority of the employees failed to report for scheduled shift assignments, it was within the agency's authority to cancel previously approved leave, in order to alleviate the disruptive effect on the agency's ability to meet its responsibility for aviation safety.

While the evidence shows that agency guidelines and advice concerning deadlines may have been interpreted differently by various facility chiefs, the evidence shows that each facility chief equitably applied the guidelines at his facility. Thus, the fact that the Jackson, Mississippi Facility Chief determined that employees' deadlines occurred after

any previously approved leave had expired does not mean that other facility chiefs were required to adopt that policy.

Appellant Harry D. Sutton asserted that he was unable to work during the period of August 4 to August 8, 1981 because he was under the care of a dentist and was taking prescription drugs during that time.

The agency established August 5, 1981 at 3:00 p.m. as Sutton's deadline for reporting to work. 4 Area Manager James J. Quinn testified that he observed Sutton picketing on August 6, 1981 (T. 670). Sutton did not testify at the hearing but furnished, as a post-hearing submission, a January 4, 1983 affidavit by Harold G. Stratton, D.D.S. Stratton advised, in pertinent part, that on July 4, 1981, he prescribed Ananase 100 (an anti-inflammatory to reduce swelling) and Keflex 5090 (an antibiotic which is a penicillin substitute). However, Stratton did not advise that the appellant's condition or medication incapacitqted him from performing controller duties. Significantly, in his oral and written responses furnished to the agency, the appellant provided no explanation for his failure to report for his August 5, 1981 shift assignment. Nor did the appellant raise any medical claims in his initial appeal to the Board. Further, there is no evidence or argument that the appellant sought sick leave for August 5, 1981. Accordingly, I find that the evidence presented does not support Sutton's claim of incapacitation.

The appellants argue that they considered themselves terminated as of 11:00 a.m. on August 5, 1981, based on the President's August 3, 1981 message. The appellants also claim that the agency was remiss in failing to notify them of an extended deadline to return to work as a result of the Presidential "amnesty" or that there was confusion concerning deadlines.

Any reporting deadline confusion by the appellants could have been avoided or resolved by reporting to or contacting the facility by 11:00 a.m. on August 5, 1981, if the appellants in fact perceived that to be their reporting deadline; however, none of the appellants elected to pursue such a course of action. While the agency did not communicate to each appellant his specific deadline which was based on its liberal construction and application of President Reagan's 48-hour "amnesty", the agency was under no obligation to convey that information. It was not the agency's responsibility to seek out and attempt to persuade each appellant to report for work. Thus, I find that those appellants who now contend that they failed to report for duty because of a confusion about a deadline, if there was in fact confusion, did so as the result of their own irresponsibility and not the result of any agency nonfeasance.

Based on the appellants' established unauthorized absences and the prima facie case of strike participation which the appellants have not successfully rebutted, I find that the preponderance of the evidence supports the charges. Because the evidence

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The appellants contend tha the agency committed certain procedural errors. An agency's decision may not be sustained if it is shown that harmful error in the application of the agency's procedures at arriving at such a decision occurred. 5 U.S.C. § 7701(c)(2)(A). The burden is upon an appellant to establish, as an affirmative defense, that there was error and that it was harmful. Parker v. Defense Logistics Agency, 1 MSPB 489, 492 (1980). Harmful error is defined in the Board's regulations at 5 C.F.R. § 1201.56(c)(3) as "error which might have caused the agency to reach a conclusion different than the one reached." In deciding whether such error rises to that standard, the Board found that it is helpful to consider:

> "whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, the decisive factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error." Id. at 493.

The appellants first claim that they were improperly denied 30 days' advance notice of the proposed removal actions. The law provides that an employee against whom an action is proposed is entitled to at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Because 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because the appellants were absent without authorization or notice from work during the strike, the agency had reasonable cause to believe the appellants had committed a crime for which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified and I find no error with respect to this matter. Schapansky, supra, at 8.

The appellants furnished no evidence in support if their claim that statutes prohibiting strikes by federal employees are unconstitutional and the Board has concluded otherwise. Ketchem, supra, at 5, with pertinent case law citations at footnote 12.

The appellants also contend that they were improperly denied a minimum of 7 days in which to orally respond to the charges. An employee against whom an adverse action is proposed is entitled to a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer. 5 U.S.C. § 7513(b)(2).

A review of the record reveals that in most cases, oral responses by rhe appellants were heard by the agency official on the seventh day or later, after receipt of the notice of proposed removal. In Parker, supra, at 492, the Board, in keeping with Congressional intent as to when procedural error is to be considered to be reversible error, found that the statute clearly places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful.

In Ratley v. Department of the Army, MSPB Dkt. No. AT07528110338 at 5, (September 17, 1982), the Board held as follows:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonble and violates the requirements mandated by statute and is thus not in accordance with law. (footnote omitted.

Ratley can be read as holding that less than seven days to reply to an advance notice is per se harmful procedural error because seven days is mandated by law. Upon examination of the law and Board Orders, however, Ratley stands as inconsistent. Nowhere in the law are procedural errors reversible errors because they are "not in accordance with the law." It is the agency's decision to take disciplinary action that cannot be sustained by the Board if it is not in

accordance with law. 5 U.S.C. § 7701(c)(2)(C). Within that same section of the statute, Congress provides that agency decisions cannot be sustained if the appellant shows harmful error in procedures used to effect the action. 5 U.S.C. § 7701(c)(2)(A). If errors in procedures mandated by statute are considered harmful per se, absurd results could ensure. For example, when an agency does not give an employee specific reasons for an imposed disciplinary action, but the record shows that the appellant was aware of the reasons for the discipline, or if an agency gives an employee only 29 days rather than the statutorily mandated 30 days' advance notice. Cf. Cade v. U.S. Postal Service, MSPB Dkt. No. SF07528010370 (November 30, 1981) (the Board found that a failure to afford the appellant the full period of time required is not reversible error absent a showing of harmful error by the appellant); Gallego v. Department of the Navy, MSPB Dkt. No. SF07528110759 (July 21, 1982) (shortening the notice period by seven days was error but that it did not warrant reversal of the removal action under 5 U.S.C. § 7701(c)(2)(A).

While twenty nine of the appellants plead harmful error with respect to the fact they received less than seven days to make an oral reply, they have not shown harm. Accordingly, I find that any shortened oral response period had no effect on the agency decision and, therefore, conclude that such does not constitute harmful error.

The next claim of harmful error made by the appellants is that theywere unlawfully suspended during the pendency of the removal actions. The agency acknowledged that the appellants were placed in a non-duty and non-pay status during the notice period.

A "suspension" is defined as the placing of any employee in a temporary status without duties and pay for disciplinary reasons. 5 U.S.C. §§ 7501(2) and 7511(2). It is apparent that the agency considered it contrary to its best interest to return the appellants to a duty status during the notice period. However, the agency has offered no explanation for failing to retain the appellants in accordance with the procedures set out in 5 U.S.C. § 7513 which includes, inter alia, an advance written notice and a right to reply to the proposed action. It is clear from the record that the agency did not furnish the appellants with a notice of proposed suspension nor furnish them with an opportunity to reply thereto. Accordingly, I find that the agency's de facto suspension actions were effected without regard for the requirements of 5 U.S.C. § 7513 and, therefore, cannot be sustained.5 See Cuellar v. U.S. Postal Service, MSPB Dkt. No. SF075299045 (November 13, 1981).

The appellants also contest the fact that they were denied requests for extensions of time in which to provide their responses to the proposed removal actions, but provided only speculation of harmful error in that regard. Thus, the appellants have

failed to carry the burden of proof with respect to the claim of harmful error in connection with that matter. Nevertheless, on my review of the record, the claims made by the appellants, and the circumstances wherein the majority of the facility's workforce was absent from scheduled shifts, I find that the appellants were afforded a reasonable time to review the material relied on to support the proposed removals and to respond to the proposed actions. Accordingly, I find no error with respect to the agency's decision to deny these requests for time extensions.

The appellants also claim harmful error based on the fact that their requests for certain documentary material, during and after their oral presentations, was not then provided. However, the appellants have not shown how that material, some of which had been previously furnished or made available and some of which was subsequently obtained through discovery proceedings, would have had any effect on the agency decision. Accordingly, I find no error with respect to thismatter. Even if it was error, it is now shown to be harmful.

The appellants next claim that the agency evidence concerning the charges, should have been limited, at the hearing, to that material and evidence provided prior to the hearing.

A proceeding before the Board is a de novo proceeding, and the Board may consider all the relevant evidence presented by both parties. Nothing in

the law or in the Board's regulations restricts an agency to reliance upon its documentary administrative record. Ziess v. Veterans Administration, MSPB Dkt. No. NY075209017 (September 1, 1981). See also Chavez v. Office of Personnel Management, MSPB Dkt. No. DA831L09003 at 13-14 (May 28, 1981). Thus, contrary to the appellants' claim, the agency evidence of picketing activity, PATCO membership, and strike support activities constituted admissible evidence relating to strike participation.

The appellants also contend that the removal actions were pre-determined as the result of statements by public officials, including President Reagan, that strikers would be fired. However, the evidence show that each appellant was afforded the opportunity to respond to the charges against him, but that few furnished any explanation for their absences. The evidence, as reflected by the testimony of Parker, reveals that individual consideration was given to each appellants' case and that Parker had the authority to decide each case based on individual circumstances. Thus, the appellants' assertion that the actions were pre-determined is not supported by the evidence presented.

The appellants contend that the agency actions against them constituted a prohibited personnel practice, specifically claiming that they were treated unequally when certain employees were allowed to return to work, because of varying deadlines. However, the appellants have not pointed out any instance where

similarly situated employees were treated differently, i.e., there is not evidence showing that any employees not taking advantage of the Presidential "amnesty" were allowed to return to work. Thus, the appellant's have failed to show unequal or disparate treatment.

Contrary to the appellants' claim, the evidence presented does not reveal the removal actions were a violation of the Merit System principles set out in 5 U.S.C. § 2301. Any failure of the agency to consider appellants' work performance, ability, aptitude, and general qualifications, is of no consequence since those matters are irrelevant to the charges on which the removal actions were based. The appellants also claim that the removal actions were taken against them as reprisal for their disclosure of violations of laws, rules, and regulations, mismanagement, gross waste of funds; abuse of authority; and substantial danger to public safety. However, the evidence, as revealed in the testimony of agency officials, discloses the sole reasons for the removal actions were as set out in the letters of proposed removal, specifically, AWOL and strike participation. Accordingly, I find no merit in the appellants' claim of reprisal.

The appellants also claim that the agency prohibition against their reemployment with the agency and their inability to compete with others for employment because of the stigma of their removal, constitutes a prohibited personnel practice; however, those matters are not subject

to my review in this decision. Contrary to the appellants' assertion, I find that any subsequent settlement of appeals concerning other former air traffic controllers removed for striking and AWOL is irrelevant to the issues in the instant appeals.

Nexus may be presumed where there is a "clear and direct relationship" between such misconduct and both the "employees ability to accomplish his...duties satisfactorily" and "the agency's ability to fulfill its mission." Doe v. Hampton, 566 F.2d 265, 272, n. 20 (D.C. Cir. 1977); see also, Bonet v. U.S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981).

Because of the intentional disruptive effect of the strike on the agency mission, caused by the appellants' absences in support of a strike, I find no basis for mitigating the penalty of removal, notwithstanding the appellants' prior favorable employment record.

Removal of an air traffic controller for proven participation in a strike against the Federal government is an appropriate penalty and promotes the efficiency of the service. Johnson v. Department of Transportation, MSPB Dkt. No. DC075281F0998 at 16 (November 10, 1982); Schapansky, supra, at 10-11. Since removal is found to be appropriate in these cases, it is unnecessary for me to determine the correctness of the agency's assertion that removal of a striking employee is mandated by statute.

DECISION

The removal actions are AFFIRMED. The agency is ORDERED to amend the records to show each appellant in a pay status from the date of the notice of proposed removal through the effective date of the removal action.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 17, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1)[6], the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

S. F. VESSER
Presiding Official

FOOTNOTES

1. The name of each appellant to whom this de listed in Attachment A. The appeals of other appeals were included in the consolidated addressed in separate decisions.

2. The appellants generally denied receiving teh agency that a strike was in progress furnished no evidence showing that delivery of effected.

3. Memphis Center Bulletin No. 33, dated Ju Notice 1600.19 (Memphis Center's Job Action Pla 1981 (See Tab 13 of the file furnished by the each appellant).

4. Because Stratton had scheduled regular day August 3 and 4, 1981, he was charged with str and AWOL commencing at 3:00 p.m. on August 5 regularly scheduled shift.

5. Because the Board lacks jurisdiction over b make no finding with respect to that matter. S S. Postal Service, MSPB Dkt. No. PHO7528010154 Pursuant to 31 U.S.C. § 71, back pay disputes a by the Office of the Comptroller General.

6. As modified by § 127 of the Federal Court I 1982, to be codified at 28 U.S.C. § 1209(a)(9).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

R.E. BADER, et al, (Memphis, TN ATCT & ARTCC)	*
Appellants,	*
v.	*
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,	*
Agency.	*

ORDER

By a submission dated December 11, 1982, the attorney for the above-referenced appellants moved for reconsideration of the decision to deny appellants' request that the record be re-opened for the development of evidence of recent settlements of appeals by former air traffic controllers.

The motion for reconsideration is Denied, as is the motion for certification, on the basis that the matter sought to be certified does not met the criteria for certification set out in 5 C.F.R. § 1201.92.

Ordered this 5th day of January, 1983.

S. F. VESSER
Presiding Official

No.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986

P. M. BERGH, et al	*	Appeal No. 85-1102
MILTON C. CROISSANT, et al	*	Appeal No. 85-1103
LARRY L. JOHNSON, et al,	*	Appeal No. 85-1106
JOHN C.HOLEN, et al	*	Appeal No. 85-1108
MYRON L. THOMSON, et al	*	Appeal No. 85-1240
JOHN W.KARR, et al,	*	Appeal No. 85-1241
STUART F. ETTER, et al,	*	Appeal No. 85-1242
MELVIN L.BEEBE, et al,	*	Appeal No. 85-1243
WILLIAM C. JOHNSON, et al,	*	Appeal No. 85-1245
	*	
v.	*	
	*	
DEPARTMENT OF TRANSPORTATION,FAA	*	
	*	
Respondent.	*	

DECIDED: July 2, 1986

Before FRIEDMAN, SMITH, and BISSELL, Circuit Judges, FRIEDMAN, Circuit Judge.

In this petition for review, former air traffic controllers challenge the decisions of the Merit Systems Protection Board (Board) upholding their removal by the Federal Aviation Administration (Administration) for participating in the illegal 1981 strike on various grounds. A major contention is that the Administration acted improperly by reinstating other controllers whom it also had removed for striking but not reinstating the petitioners. We reject the petitioners' challenges to the decisions of the Board and affirm them.

I.

Counsel for the petitioners requested oral arguments. We determined, however, that all but one of the issues the petitioners raised

have been authoritatively decided in our previous decisions, that the facts and legal arguments were adequately presented in the briefs and record, and that the decisional process woudl not have been aided by oral argument. Fed. R. App. P. 34(a). We heard oral argument on the issue whether the Administration acted improperly in reinstating some, but not all, of the fired controllers.

II.

A. the parties stipulated that "[t]he FAA nationwide has reinstated some air traffic controllers/appellants who were removed for participation in the [air traffic controllers] strike pursuant to settlement agreement." The petitioners argue that the agency "violated MSPB principles and fundamental fairness by reinstating

some controllers found guilty of striking, for no reason which can be discerned from the record." They cite Douglas v. Veterans Administration, 5 MSPR 280 (1981), and Woody v. General Services Administration, 6 MSPR 468 (1981), for the proposition that "where an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." Woody, 6 MSPR at 488 (citing Douglas, 5 MSPR at 306-07). The Petitioners assert that the agency "has provided no explanation, much less any evidence, as to why it vacated its findings and dismissed its charges against the reinstated controllers while denying petitioners this benefit."

Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

The agency has given the following explanation in its brief of the process by which, and the reasons why, it determiined to settle some of the cases but not those of the petitioners:

> The FAA conducted an in-depth analysis of each of the 11,000 cases of the removed air traffic controllers in preparation for the litigation before the MSPB. As part of the litigation strategy, the FAA undertook an analysis of the strengths and weaknesses of each case. Based on this individualized analysis, the agency made decisions to enter into settlement negotiations with certain air traffic controllers whose appeals were pending. As part of this analysis, the FAA also reviewed the individual cases of the petitioners and made individual determinations that settlement was not warranted in these cases. The agency embarked on the litigation analysis in order to best prepare its cases for hearings, not under any policy to settle cases. The cases selected for settlement were those whose examination demonstrated to the FAA that further litigation would not be successful.

We know of no principle that precludes the government from settling, upon whatever terms it deems suitable, cases in which it determines

that the likelihood of success is so low as to make continued litigation inappropriate. The decision whether to settle a particular case and upon what terms is a matter particularly within the discretion of the agency conducting the litigation. The agency was not required to give detailed reasons in each particular case concerning the facts that led it to settle rather than to litigate, as the petitioners apparently would require it to do. The agency's statement that based upon "an analysis of the strengths and weaknesses of each case", it decided not to conduct "further litigation" of those cases where the analysis indicated that such litigation "would not be successful", was a sufficient explanation for the settlements the government made.

The law favors settlement of

cases. United States v. Contra Costs County Water District, 678 F. 2d 90, 92 (9th Cir. 1982); Stotts v. Memphis Fire Department, 679 F. 2d 541, 565 (6th Cir. 1982); Airline Stewards & Stewardesses Association, Local 550, TWU, AFL-CIO v. American Airlines, 573 F.2d 960, 963 (7th Cir. 1978); Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960); Fed. R. Evid. 408 advisory committee note. The government is to be commended, not criticized, for deciding not to litigate those of the vast number of air traffic contoller cases pending before the Board in which it concluded that its likelihood of success was so small as to make continued litigation unwise.

B. The petitioners next contend that the Administration denied them equal protection because, due to

friendship or personal favoritism, Administration officials notified other air traffic controllers, but not the petitioners, of their deadline shift for reporting to work. They rely upon Olshock v. Village of Skokie, 411 F. Supp. 257 (N.D. 111), aff'd, 541 F.2d 1254 (7th Cir. 1976). In Olshock, during a police officers strike the Village of Skokie took an informal poll to determine which officers might return to work. Those who said they would do so were notified that if they reported by a specific date, they would not be discharged, but merely suspended. The court held that

> [t]he failure of defendants to give all the 59 striking policemen notice that they would not be discharged if they reported for duty in uniform on or prior to July 13, 1975, and the failure of defendants to give said

> notice to the plaintiffs herein, constituted a failure to provide equal protection of the laws to plaintiffs within the meaning of and as required by the Fourteenth Amendment to the United States Constitution . . . .

Id. at 265.

The rationale of Olshock was that the Village unfairly had discriminated against those officers who were not notified that if they reported by the deadline, they would not be discharged, in favor of those who were notified. In that situation, the non-notified officers were not aware of the deadline and the consequences of failing to meet it. The air traffic controllers, however, were in a quite different situation, for we have held that

> [e]ach petitioner knew when his next regularly scheduled shift commenced and elected

> not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium.

Adams v. Department of Transportation, FAA, 735 F.2d 488, 491 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984).

The petitioners argue, however, that even if the Administration was not required to notify all the air traffic controllers of their deadline shifts, it could not selectively notify some but not others. The petitioners point out that Mr. Helms, the administrator of the agency, issued a "directive" that supervisors should encourage their friends to come back to work.

The Helms statement, however, did not relate to notifying controllers of their deadline shifts, but only urged supervisors to encourage controllers with whom they were friendly to return to work. In his testimony Mr. Cox, a supervisor at one of the towers involved, explained the scope and purpose of the Helms statement:

> Q. Now in this telecon, Mr. Helms advised that he did not want supervisors to be calling controllers as supervisors, is that right?
>
> A. That was not a directive. He suggested that the Agency -- he said the Agency was not going to instruct supervisors to make calls as supervisors to their people.
>
> Q. So he said that as far as the Agency's position was concerned, as a supervisor you were not being directed to call --
>
> A. That's correct.
>
> Q. Controllers, is that correct? But he did say that the Agency was

suggesting that supervisors call controllers as personal friends?

A. I think that's a little liberal. My interpretation of what I heard was that if you felt, and if you were concerned about these people as friends -- he wasn't suggesting to call everybody as a friend. What he was saying is that if you had someone you were especially concerned about as a friend, that you could be influential with and answer questions, go ahead and give him a call.

C. The petitioners argue that the Administration "erroneously decided that 5 U.S.C. Section 7311 require[d] dismissal of any employee found guilty of striking." whereas that statute permitted the agency to impose a lesser penalty. We rejected a similar contention in Schapansky v. Department

of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984), where we ruled that

> [w]hether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States.

Id. at 485.

Similarly, in the present case we cannot find that the Administration abused its discretion or otherwise acted improperly in concluding that the appropriate penalty for the petitioners' illegally striking against the government was removal.

D. Two of the petitioners (Burkette, No. 85-1102, and Johnson, No. 85-1245) contend that their failure to report for work resulted

not from participating in the strike but because they were confused about their deadline shift for reporting. We have rejected similar claims in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir), cert. denied, 105 S. Ct. 432 (1984); and Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984). For the reasons given in those opinions, we also reject the claim here.

The decisions of the merit Systems Protection Board upholding the removal of the petitioners are affirmed.

AFFIRMED